Hassan bin Jamaludin & Anor v Saridah bt Ashaari & Ors and another appeal

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NOS W-02(IM)(NCC)-634–05 OF 2020 AND W-02(IM)(NCC)-637–05 OF 2020
MOHAMAD ZABIDIN, NANTHA BALAN AND DARRYL GOON JJCA
5 JANUARY 2022

Civil Procedure — Striking out — Appeal — Appeal against court's decision in allowing applications to strike out claim — Appellants sought return of shares in company so as to resume being its sole shareholders — Defendants applied to strike out claim — Whether plaintiffs had any sustainable claim — Whether learned judicial commissioner erred in allowing applications to strike out

The appellants in these appeals were the plaintiffs in a Kuala Lumpur High Court suit ('Suit 315'). The appeals were directed at the decision of the learned judicial commissioner who had allowed the striking out applications made under O 18 r 19 of the Rules of Court 2012 ('the ROC') ('encl 21' and 'encl 23') by all the respondents ('defendants') to strike out Suit 315, save for the fourth defendant ('D4') who did not enter an appearance to Suit 315. Enclosure 21 was the striking out application jointly made by the first to third defendants ('D1', 'D2' and 'D3') and the company, Langkah Bakti Sdn Bhd, ie the ninth defendant ('D9'). Enclosure 23 was the striking out application jointly made by the fifth to eighth defendant ('D5', 'D6', 'D7' and 'D8'). The first plaintiff ('P1') and second plaintiff ('P2') were husband and wife. D1 was a friend of P1 since their college days. D9 was a property development company. The plaintiffs were at one time owners of all the shares in D9, and directors of D9. P2 resigned as a director of D9, followed by P1 and eventually the plaintiffs ceased to be shareholders of D9. D9 was involved in various development projects including a project in Kampung Kerinchi ('Kg Kerinchi project'). D1 was at all material times the Group Executive Chairman of the Amona Group of Companies. D2 to D8 were at all material times the nominees of D1 and they were, essentially, D1's companies, family members and colleagues. In or around 1996, the plaintiffs decided to move to Bosnia/Herzegovina to undertake reconstruction work. They decided to sell part of their shareholding in D9. They had an earlier agreement with an entity known as Langkah Kurnia Sdn Bhd ('LKSB') whereby LKSB would purchase 60% of the plaintiffs' shareholding in D9 for RM22m. According to the plaintiffs, LKSB had paid a sum of RM2.2m as deposit towards purchasing their shares in D9. In November 1996, however, D1 made a proposal for 60% of the plaintiffs' shares in D9. Initially, D1 suggested that 60% of the plaintiffs' shares in D9 be 'sold' to D1 as he had the skill, expertise and financial resources.

A D1 also suggested that the share sale transaction with LKSB be terminated. According to the plaintiffs, D1 had informed P1 that D2 had unutilised credit facilities from Kewangan Usaha Bersatu Bhd amounting to RM30m which could be utilised for D9's projects. D1 said that he was prepared to repay the deposit of RM2.2m to LKSB with additional compensation. Later, D1 B suggested that D9's authorised capital be increased and that there should be an allotment of 60% of the increased share capital of D9. The plaintiffs' grievance was that they were 'cheated' of their entitlement to ownership of their shares in D9.

C **Held**, dismissing the appeals:

(1) The plaintiffs' pleaded case, coupled with the plaintiffs' letter dated 8 August 2016, was really one for recovery of monetary entitlements arising out of an alleged 'agreement' which was formed sometime in late D 1996 and which became the catalyst for the first share allotment of 375,000 shares on 27 August 1997 and the second allotment of 2,175,000 shares on 24 February 1999. The third impugned event took place on 6 May 1999, when the plaintiffs' remaining 8.9% shares in D9 were transferred to D2. The latest date, 6 May 1999, should be taken as E the date by which the plaintiffs' cause(s) of action for the entire claim would have crystallised. On that basis, the last date for the filing of any action, whether in tort or contract would be 5 May 2005. Here, however, Suit 315 was filed on 4 March 2019 which was roughly 20 years from the latest date that any cause of action in contract or tort would have arisen. F Thus, on that basis, the plaintiffs' claims whether grounded in contract or tort, was time barred (see paras 41–42).

(2) The court was not convinced that the share allotments at par value instead of an allotment at market value or at a premium was, in itself, G illegal. Even assuming that the first allotment and second allotment were in contravention of s 67 of the Companies Act 1965, the allotments were not ipso facto rendered null and void. Further, it was D9 and not the plaintiffs which would have the requisite locus standi to pursue such a claim. The plaintiffs, not being shareholders or creditors of D9, did not H have any legal basis to mount a claim in respect of the share allotments. In addition, the plaintiffs inertia and inaction (which had not been explained) in all those years until the suits were filed, was an implied, if not express, manifestation of acquiescence on their part, and the plaintiffs were therefore barred from seeking any declaratory reliefs by I reason thereof and in addition, by reason of laches. The plaintiffs were not entitled to make such a claim after such a long period of inaction on their part. Clearly, by their conduct, the plaintiffs had acquiesced in the state of affairs in D9 vis a vis the shareholdings of the respective defendants. This case was a plain and obvious one where the defendants

were entitled to rely on acquiescence and/or laches to defeat the plaintiffs' claims as pleaded in the statement of claim (see paras 50–52, 54 & 56–58).

[Bahasa Malaysia summary

Perayu dalam rayuan ini adalah plaintif dalam saman Mahkamah Tinggi Kuala Lumpur ('Guaman 315'). Rayuan tersebut ditujukan kepada keputusan pesuruhjaya kehakiman yang bijaksana yang telah membenarkan permohonan pembatalan yang dibuat di bawah A 18 k 19 Kaedah-Kaedah Mahkamah 2012 ('KKM') ('lampiran 21' dan 'lampiran 23') oleh semua responden ('defendan') untuk membatalkan Guaman 315, kecuali defendan keempat ('D4') yang gagal untuk memasukkan kehadiran dalam Guaman 315. Lampiran 21 ialah permohonan pembatalan yang dibuat bersama oleh defendan pertama hingga ketiga ('D1', 'D2' dan 'D3') dan syarikat, Langkah Bakti Sdn Bhd, iaitu defendan kesembilan ('D9'). Lampiran 23 ialah permohonan pembatalan yang dibuat bersama oleh defendan kelima hingga kelapan ('D5', 'D6', 'D7' dan 'D8'). Plaintif pertama ('P1') dan plaintif kedua ('P2') ialah suami isteri. D1 ialah kawan P1 sejak zaman kolej lagi. D9 ialah sebuah syarikat pembangunan hartanah. Plaintif pada satu masa adalah pemilik semua saham dalam D9, dan pengarah D9. P2 meletakkan jawatan sebagai pengarah D9, diikuti oleh P1 dan akhirnya plaintif tidak lagi menjadi pemegang saham D9. D9 terlibat dalam pelbagai projek pembangunan termasuk projek di Kampung Kerinchi ('projek Kg Kerinchi'). D1 pada setiap masa adalah Pengerusi Eksekutif Kumpulan bagi Kumpulan Syarikat Amona. D2 hingga D8 pada setiap masa adalah penama D1 dan mereka, pada asasnya, syarikat, ahli keluarga dan rakan sekerja D1. Pada atau sekitar tahun 1996, plaintif memutuskan untuk berpindah ke Bosnia/Herzegovina untuk menjalankan kerja pembinaan semula. Mereka memutuskan untuk menjual sebahagian daripada pegangan saham mereka dalam D9. Mereka mempunyai perjanjian awal dengan sebuah entiti yang dikenali sebagai Langkah Kurnia Sdn Bhd ('LKSB') di mana LKSB akan membeli 60% pegangan saham plaintif dalam D9 dengan harga RM22 juta. Menurut plaintif, LKSB telah membayar sejumlah RM2.2 juta sebagai deposit untuk membeli saham mereka dalam D9. Pada November 1996, bagaimanapun, D1 membuat cadangan untuk 60% saham plaintif dalam D9. Pada mulanya, D1 mencadangkan 60% saham plaintif dalam D9 'dijual' kepada D1 kerana dia mempunyai kemahiran, kepakaran dan sumber kewangan. D1 juga mencadangkan agar transaksi penjualan saham dengan LKSB ditamatkan. Menurut plaintif, D1 telah memaklumkan P1 bahawa D2 mempunyai kemudahan kredit yang tidak digunakan daripada Kewangan Usaha Bersatu Bhd berjumlah RM30 juta yang boleh digunakan untuk projek D9. D1 berkata dia bersedia membayar balik deposit RM2.2 juta kepada LKSB dengan pampasan tambahan. Kemudian, D1 mencadangkan agar modal dibenarkan D9 ditambah dan perlu ada peruntukan sebanyak 60% daripada peningkatan modal saham D9. Keluhan plaintif adalah bahawa mereka 'ditipu' tentang hak mereka untuk pemilikan saham mereka dalam D9.

Diputuskan, menolak rayuan-rayuan:

(1) Kes yang diplidkan oleh plaintif, ditambah pula dengan surat plaintif bertarikh 8 Ogos 2016, adalah sebenarnya satu untuk mendapatkan semula hak kewangan yang timbul daripada 'perjanjian' yang didakwa telah dibentuk pada akhir 1996 dan yang menjadi pemangkin kepada peruntukan saham pertama sebanyak 375,000 saham pada 27 Ogos 1997 dan peruntukan kedua sebanyak 2,175,000 saham pada 24 Februari 1999. Peristiwa ketiga yang dipersoalkan berlaku pada 6 Mei 1999, apabila baki 8.9% saham plaintif dalam D9 telah dipindahkan ke D2. Tarikh terkini, 6 Mei 1999, hendaklah diambil sebagai tarikh di mana kausa tindakan plaintif bagi keseluruhan tuntutan akan terbentuk. Atas dasar itu, tarikh terakhir untuk memfailkan sebarang tindakan, sama ada dalam tort atau kontrak ialah 5 Mei 2005. Di sini, bagaimanapun, Guaman 315 telah difailkan pada 4 Mac 2019 iaitu kira-kira 20 tahun dari tarikh terkini dimana sebarang tindakan dalam kontrak atau tort akan timbul. Oleh itu, atas dasar itu, tuntutan plaintif sama ada berdasarkan kontrak atau tort, telah dihalang masa (lihat perenggan 41–42).

(2) Mahkamah tidak diyakinkan bahawa peruntukan saham pada nilai tara dan bukannya peruntukan pada nilai pasaran atau premium adalah, dengan sendirinya, menyalahi undang-undang. Walaupun dengan mengandaikan bahawa peruntukan pertama dan peruntukan kedua adalah bertentangan dengan s 67 Akta Syarikat 1965, peruntukan itu tidak secara ipso facto menjadi batal dan tidak sah. Selanjutnya, D9 dan bukan plaintif yang mempunyai locus standi yang diperlukan untuk meneruskan tuntutan sedemikian. Plaintif, bukan pemegang saham atau pemiutang D9, tidak mempunyai sebarang asas undang-undang untuk membuat tuntutan berkenaan dengan peruntukan saham. Di samping itu, inersia dan ketiadaan tindakan plaintif (yang tidak dijelaskan) dalam sepanjang tahun tersebut sehingga saman difailkan, adalah manifestasi persetujuan tersirat, jika tidak nyata, di pihak mereka, dan oleh itu plaintif dilarang daripada memohon sebarang relif pengisytiharan dan sebagai tambahan, oleh sebab laches. Plaintif tidak berhak untuk membuat tuntutan sedemikian selepas tempoh yang lama tidak bertindak di pihak mereka. Jelas sekali, melalui kelakuan mereka, plaintif telah akur dengan keadaan dalam D9 vis a vis pegangan saham defendan. Kes ini adalah satu kes yang jelas dan nyata di mana defendan berhak untuk bergantung pada persetujuan dan/atau laches untuk mengalahkan tuntutan plaintif seperti yang diplidkan dalam penyataan tuntutan (lihat perenggan 50–52, 54 & 56–58).]

Cases referred to

Hassan bin Jamaludin & Anor v Othman bin Ahmad & Ors [2020] MLJU 1009; [2020] 1 LNS 789; [2020] AMEJ 0719, HC (refd)

Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd [1999] 3 MLJ 81, FC (folld)
Nasri v Mesah [1970] 1 LNS 85; [1971] 1 MLJ 32, FC (refd)

Legislation referred to

Companies Act 1965 (repealed by Companies Act 2016) s 67, 67(1)
Limitation Act 1953 ss 6, 32
Rules of Court 2012 O 18 r 19, 19(1)(a), (1)(b), (1)(c), (1)(d), O 21 r 3

Appeal from: Suit No WA-22NCC-315–06 of 2019 (High Court, Kuala Lumpur)

Malik Imtiaz Ahmed B Ghulam Sarwar (Wong Ming Yen and Mohamad Faisal Jaafar with him) (Zahari Affendi & Partners) for the appellant.
Krishna Dallumah (Yong Yong Hui with him) (Krishna Dallumah & Indran) for the respondents.

Nantha Balan JCA:

INTRODUCTION

[1] This is the judgment of the court in respect of Appeal No W-02(IM)(NCC)-634–05 of 2020 ('Appeal 634') and Appeal No W-02(IM)(NCC)-637–05 of 2020 ('Appeal 637'). The Appellants in both appeals are the plaintiffs in Kuala Lumpur High Court Suit No WA-22NCC-315–06 of 2019 ('Suit 315'). Suit 315 was filed on 4 March 2019 and was originally registered in the Civil Division as Suit No WA-22NCvC-118–03 of 2019. It was then transferred to the New Commercial Court (NCC) Division and re-registered as Suit 315.

[2] The appeals before us are directed at the decision of the learned judicial commissioner ('JC') who had allowed the striking out applications made under O 18 r 19 Rules of Court 2012 ('the ROC') (encls 21 and 23) by all the defendants to strike out Suit 315, save for the fourth defendant ('D4') who did not enter an appearance to Suit 315. On 4 May 2020 the learned JC allowed encls 21 and 23.

[3] Enclosure 21 was the striking out application jointly made by the first defendant ('D1'), second defendant ('D2'), third defendant ('D3') and the company, Langkah Bakti Sdn Bhd, ie the ninth defendant ('D9'). Enclosure 23 was the striking out application jointly made by the fifth defendant ('D5'), sixth defendant ('D6'), seventh defendant ('D7') and the eighth defendant ('D8'). The learned JC's decision in respect of encls 21 and 23 has since been reported as *Hassan bin Jamaludin & Anor v Othman bin Ahmad & Ors* [2020] MLJU 1009; [2020] 1 LNS 789; [2020] AMEJ 0719 (HC).

A PREVIOUS SUITS

[4] It is necessary to mention at the outset that Suit 315 was the third in a trilogy of suits that were filed by the plaintiffs. The plaintiffs had previously filed Kuala Lumpur High Court Suit No 22NCVC-111–02 of 2018 ('Suit 111') and Kuala Lumpur High Court Suit No 22NCVC-304–05 of 2018 ('Suit 304'). Suit 111 was filed on 26 February 2018 whereas Suit 304 was filed on 23 May 2018. The reliefs sought in Suit 111 and 304 were similar, ie, that D9 be 'returned' to the plaintiffs and an order that damages for loss of profit in the sum of RM196.6m be paid.

[5] Suit 111 was filed against D1 and D2. D2 applied (via encl 11) under O 18 r 19(1)(a) of the Rules of Court 2012 to strike out Suit 111. On 11 April 2018, the High Court allowed encl 11 and struck out the Suit 111.

[6] On 7 September 2018, upon the plaintiffs indicating that they would withdraw Suit 111 against D1, the High Court struck out Suit 111 against D1, with liberty to file afresh against D1 only. The High Court's order was quite specific and which read as follows:

> Writ Saman dan Pernyataan Tuntutan Plaintiff-Plaintif yang bertarikh 23 February 2018 dibatalkan dengan kebebasan untuk memfailkan terhadap defendant Pertama sahaja dan Plaintif-Plaintif membayar kos sebanyak RM5,000 kepada defendan Pertama.

[7] In the meanwhile, although Suit 111 was struck out as against D2, Suit 304 was nevertheless filed on 23 May 2018 against D2. In Suit 304 the plaintiffs sought the same relief that was sought in Suit 111. D2 applied (encl 6) under O 18 r 19(1)(b), (1)(c) and (1)(d) of the ROC to strike out Suit 304. On 3 October 2018, Suit 304 was withdrawn and struck out with costs of RM10,000. The order states that Suit 304 was withdrawn under O 21 r 3 of the ROC which caters for the discontinuance of an action with leave of the court.

[8] As mentioned earlier, the present appeals arose out of Suit 315 which was filed on 4 March 2019.

[9] It would be convenient to state briefly the origins and nature of the dispute which resulted in the filing of Suit 111, Suit 304 and finally, Suit 315. The background facts are the same for all three suits.

[10] It is fair to say that the plaintiffs' claim in Suit 111 and Suit 304 were identical in terms of the cause of action and relief, whereas the claim

per Suit 315 was somewhat different from the earlier suits, both in terms of the pleaded cause(s) of action and reliefs sought. A

[11] It may be observed that the solicitors who filed Suit 111 were also the solicitors who filed Suit 304. Suit 315 was filed by different solicitors who had conduct of both the action in the High Court and before us. B

BRIEF FACTS

[12] The first plaintiff is En Hassan bin Jamaludin ('P1'). The second plaintiff, Puan Nasriah bt Ahmad ('P2') is P1's wife. D1 was a friend of P1 since their college days. D1 suffered a debilitating stroke in February 2016 and became incapacitated. He was represented by his litigation representative. It has been suggested by the defendants that the plaintiffs had taken advantage of D1's illness and had filed the various suits after he had fallen ill. We do not think it is necessary to entertain or analyse the defendants' theory in this regard as the plaintiffs' purported motive in filing the suits after D1 had fallen ill, is not relevant. The pertinent issues in the present appeals were whether the plaintiffs have any sustainable claim and whether the learned JC had erred in allowing the applications to strike out the writ and statement of claim and consequently the Suit 315. C D E

[13] Unless otherwise stated, all references to the statement of claim ('SOC') hereinafter made is to the SOC in Suit 315.

[14] D9 was a property development company. The plaintiffs were at one time owners of all the shares in D9, and directors of D9: F

(a) on 15 September 1997, P2 resigned as a director of D9 (see para 24.4 of the SOC);

(b) on 5 March 1999, P1 resigned as a director of D9 (see para 26.2 of the SOC); and G

(c) the plaintiffs ceased to be shareholders of D9 on 6 May 1999 (see para 26.6 of SOC).

[15] D9 was involved in various development projects including a project involving 21 acres of land in Kampung Kerinchi ('Kg Kerinchi Project') in respect of which all necessary approvals had been obtained. The details of these projects and the anticipated profits were pleaded in paras 13, 14 and 16 of the SOC. D1 was at all material times the Group Executive Chairman of the Amona Group of Companies. D2 to D8 were at all material times the nominees of D1 and they are, essentially, D1's companies, family members and colleagues. In or around 1996, the plaintiffs decided to move to Bosnia/Herzegovina to undertake reconstruction work. They decided to sell H I

part of their shareholding in D9. They had an earlier agreement with an entity known as Langkah Kurnia Sdn Bhd ('LKSB') whereby LKSB would purchase 60% of the plaintiffs' shareholding in D9 for RM22m.

[16] According to the plaintiffs' pleaded case (para 17.2 SOC) LKSB had paid a sum of RM2.2m as deposit towards purchasing their shares in D9. The deposit was paid through LKSB's solicitors Messrs Amin-Tan & Co. LKSB was to assist the plaintiffs in managing D9 and in carrying out the projects whilst the plaintiffs were away in Bosnia/Herzegovina.

[17] In November 1996, however, P1 met D1. They had a discussion. D1 made a proposal for 60% of the plaintiffs' shares in D9. Initially, D1 suggested that 60% of the plaintiffs' shares in D9 be 'sold' to D1 as he had the skill, expertise and financial resources. D1 also suggested that the share sale transaction with LKSB be terminated.

[18] According to the plaintiffs, D1 had informed P1 that D2 had unutilised credit facilities from Kewangan Usaha Bersatu Bhd (KUBB) amounting to RM30m which could be utilised for D9's projects. D1 said that he was prepared to repay the deposit of RM2.2m to LKSB with additional compensation. Later, D1 suggested that D9's authorised capital be increased and that there should be an allotment of 60% of the increased share capital of D9. The plaintiffs' grievance was that they were 'cheated' of their entitlement to ownership of their shares in D9.

THE PLEADED CASE

[19] The plaintiffs' pleaded case (in Suit 315) per paras 7–16 of the SOC read as follows:

> IV The agreement with the 1st Defendant
>
> 7. In early November 1996, the 1st plaintiff met the 1st Defendant.
>
> 7.1. The 1st Plaintiff and the 1st Defendant were friends from their college days.
>
> 7.2. The 1st Plaintiff mentioned his intention to go to Bosnia and Herzegovina, and that he had made an agreement to sell 60% of the ninth Defendant's shares to LKSB.
>
> 7.3. The 1st Defendant proposed that the Plaintiffs sell 60% of their shares in the ninth Defendant to him instead as he was financially capable at that material time and had the necessary expertise and skills to ensure the success of the Kampung Kerinchi project. The 1st Defendant also proposed that the Plaintiffs terminate the LKSB Agreement to give effect to his proposal.
>
> 7.4. In support of his proposal, the 1st Defendant told the 1st Plaintiff that his company, the second Defendant, had unutilized credit facilities amounting to

RM30,000,000 through Kewangan Usaha Bersatu Bhd (the 'KUBB facilities'). The KUBB facilities could be utilized for the ninth Defendant's projects.

7.5. The 1st Defendant further represented that he was prepared to repay the deposit of RM2,200,000 to LKSB with additional compensation.

(the '1st Meeting')

8. Pursuant to the 1st Meeting, the Plaintiffs decided to agree to the 1st Defendant's proposals.

9. Due to the 1st Defendant's assurance and the arrangement as noted in paragraphs 18.3, 18.4 and 18.5 above, the Plaintiffs terminated the LKSB Agreement.

10. In or around early December 1996, the 1st Plaintiff met the 1st Defendant again with one Haji Abdul Rahim. The Plaintiffs aver that at this meeting, the 1st Defendant reiterated the proposals made at the 1st Meeting and parties agreed on more specific terms:

10.1. That as opposed to purchasing the existing shares of the ninth Defendant, the 1st Defendant would obtain 60% of the shareholding of the 9th Defendant for RM22,000,000 through the allotment of new shares. The Plaintiffs would retain 40% of the increased shareholding of the 9th Defendant;

10.2. That a formal agreement would be prepared and executed for the above;

10.3. That the 1st Plaintiff would be retained as Executive Chairman of the 9th Defendant and would be paid a monthly salary of RM10,000;

10.4. That upon the 1st Defendant receiving the 60% shares in the 9th Defendant, he would use the KUBB Facilities for the following purposes:

(a) To immediately credit RM10,000,000 into the 9th Defendant's company account as repayment of the 1st Plaintiff's director advances and to utilize the proceeds to settle outstanding payment for construction works owed to one Autoways Sdn Bhd, a contractor for the 9th Defendant ('Autoways'). Between June 1996 to July 1997, the 1st Plaintiff had taken out approximately RM8,000,000 in director's advances from the 9th Defendant (the 'Director's Advances'). The advances were taken out in stages for both corporate and the Plaintiffs' personal use. The credit of RM8,000,000 was to be used to settle the Director's Advances.

(b) To immediately pay RM3,000,000 to LKSB's solicitors, Messrs Amin-Tan and Co, for the termination of LKSB Agreement — comprising of RM2,200,000 being the refund of deposit and RM800,000 in compensation; and

(c) To pay RM9,000,000 to the Plaintiffs within two years from acquiring 60% of the shareholding in the 9th Defendant.

(the 'Agreement')

11. As noted in paragraph 16 above, the 9th Defendant was a financially sound company at that material time and was in the midst of developing the remaining 21 acres of the Kampung Kerinchi project, which carried a gross development value of more than RM310,000,000.

12. The Plaintiffs left for Bosnia and Herzegovina in or around the end of 1996.

12.1. The Plaintiffs left it to the 1st Defendant to put the Agreement in writing and take the necessary steps to execute the same.

12.2. The Plaintiffs remained as shareholders and directors in the 9th Defendant. Although the Plaintiffs left the bulk of the management of the 9th Defendant and its projects to the 1st Defendant, the Plaintiffs retained their rights and responsibilities as directors and shareholders of the 9th Defendant on an as-needed basis, ie for the signing of the necessary resolutions.

12.3. The 1st Plaintiff ensured the 1st Defendant that he would give his best effort to negotiate with the Ministry of Home affairs to purchase an additional 452 Apartment units en bloc in Zone 2B(i) on part of the remaining 21 acres of land under the Kampung Kerinchi project.

V 1st Defendant reneges on the Agreement

13. The Plaintiffs aver that the 1st Defendant failed to fulfill all of his obligations under the Agreement.

13.1. On 27.08.1997, the 1st Defendant caused the 9th Defendant to allot 375,000 shares to his nominees, the second and fourth Defendants (the '1st Allotment'). The 1st Plaintiff signed and approved the allotment.

13.2. The 9th Defendant's paid up capital was raised from RM250,000 to RM625,000. However, pursuant to the Due Diligence Exercise, the value of the additional 375,000 shares were, at the very minimum, RM22,000,000.

13.3. As a result of the said allotment, the shareholding of the 9th Defendant at that material time was as follows:

Shareholder	No of Shares	Percentage (%)
Amona Permodalan Holdings Sdn Bhd (2nd Defendant)	250,000	40
Roslan bin Khalid (4th Defendant)	125,000	20
Hassan bin Jamaludin (1st Plaintiff)	125,000	20
Nasriah binti Ahmad (2nd Plaintiff)	125,000	20

13.4. In or around 27.08.1997, the 1st and fourth Defendants were appointed as directors of the 9th Defendant. The second Plaintiff resigned as a director of the 9th Defendant. In or around 15.09.1997, one Abdul Manaf bin Ahmad, the brother of the 1st Defendant, was appointed as a director of the 9th Defendant.

13.5. The Plaintiffs subsequently discovered that the RM3,000,000 owed to Messrs Amin-Tan & Co for the refund and compensation for the termination of the LKSB agreement was not paid.

13.6. In or around early 1999, the Plaintiffs also discovered that the KUBB facilities were never utilized and had, in fact, never existed. The Director Advances and debt to Autoways remained owing.

13.7. Ultimately, the Plaintiffs received no money from the 1st Defendant, notwithstanding the Plaintiffs having fulfilled their side of the bargain, ie causing

the 1st Defendant (through his nominees) to have 60% shareholding of the 9th Defendant. The 1st Plaintiff also never received his monthly salary of RM10,000.

[14] The Plaintiffs aver that the 1st Defendant had further caused the dilution of the remaining shares of the Plaintiffs.

14.1. In or around June 1998, the 1st Defendant, through his solicitors, Messrs Siti Nor & Partners, prepared a draft share sale agreement for the second Defendant's purchase of the Plaintiffs' remaining 40% shares in the 9th Defendant for a sum of RM1.00. The Plaintiffs refused to sign the said agreement.

14.2. The 1st Defendant then, through his solicitors, Messrs Siti Nor & Partners, prepared a draft consultancy agreement between the 1st Plaintiff and the 9th Defendant where the 9th Defendant would appoint the 1st Plaintiff as a consultant with a single remuneration of RM2,800,000.00. The 1st Plaintiff refused to sign this agreement.

14.3. On 14.01.1999, the 1st Defendant caused the 9th Defendant to issue a notice to convene an extraordinary general meeting on 29.01.1999 to consider increasing the share capital of the 9th Defendant by creating 4,000,000 additional ordinary shares and to provide the directors of the 9th Defendant with the authority to issue shares at any time at their discretion.

14.4. On 29.01.1999, the extraordinary general meeting was held and the two proposals were approved. The authorized capital of the 9th Defendant was increased to RM5,000,000.00 with the creation of 4,000,000 new ordinary shares. The 1st Plaintiff did not attend this meeting.

14.5. On 24.02.1999, the 1st Defendant caused the 9th Defendant to allot 2,175,000 shares to the second and third Defendants (the '2nd Allotment'). The directors' resolution authorizing the same was signed by the 1st Defendant, the fourth Defendant and Abdul Manaf bin Ahmad. The allotment form was signed and approved by the fourth Defendant. This resulted in the shareholding of the 9th Defendant to be proportioned in the following manner:

Shareholder	No of Shares	Percentage (%)
Amona Permodalan Holdings Sdn Bhd (2nd Defendant)	1,709,999	61
Amona Consolidated Holdings Sdn Bhd (3rd Defendant)	840,000	30
Hassan bin Jamaludin (1st Plaintiff)	125,000	4.46
Nasriah binti Ahmad (2nd Plaintiff)	125,000	4.46
Saridah binti Ashaari (5th Defendant)	1	–

14.6. The fifth Defendant was the 1st Defendant's personal secretary and his nominee.

15. The Plaintiffs aver that the 1st Defendant had further caused the removal of the remaining shares of the Plaintiffs which ultimately resulted in the removal of the Plaintiffs from the 9th Defendant.

15.1. Pursuant to the second Allotment, the 1st Defendant had requested the 1st Plaintiff to resign as a director of the 9th Defendant. The 1st Defendant also requested the Plaintiffs to sign the share sale and consultancy agreements prepared by Messrs Siti Nor & Partners as noted in paragraphs 25.1 and 25.2 above and to transfer their remaining 8.9% shares to the second Defendant.

15.2. On 5.03.1999, the 1st Plaintiff resigned as a director due to the dilution of ownership and loss of control over the 9th Defendant. One Ahmad Nasarudin Othman, an employee of Autoways, was appointed as a director of the 9th Defendant. However, the Plaintiffs refused to transfer their remaining shares.

15.3. On 16.03.1999, the 1st Defendant through his solicitors Messrs Siti Nor & Partners sent two draft letters of undertaking to the 1st Plaintiff.

a. The 1st draft letter was by the 9th Defendant, that in consideration for the Plaintiffs' transfer of shares to the second Defendant, the 9th Defendant would undertake to immediately remit RM3,000,000 to Messrs Amin-Tan & Co, solicitors for LKSB, within 2 years and to transfer 3 vehicles to the Plaintiffs. Upon the transfer of the Plaintiffs' shares to the second Defendant, the Plaintiffs would be absolved from all liabilities from the 9th Defendant.

b. The second draft letter was by the 1st Defendant and Abdul Manaf bin Ahmad, undertaking to share all profits due to them as shareholders of the second Defendant equally with the 1st Plaintiff for a consideration of RM1 to each of them.

(the 'Undertaking')

15.4. The 1st Plaintiff did not accept the Undertaking and refused to transfer their remaining shares.

15.5. Pursuant to the refusal of the Undertaking, the Plaintiffs were coerced by the 1st Defendant to transfer their remaining shares to the second Defendant.

a. Between March 1999 and early May 1999, the 1st Defendant threatened the 1st Plaintiff that if he did not transfer the 8.9% shares, the 1st Defendant would report the 1st Plaintiff to relevant officials for failing to declare the Director's Advances in the 9th Defendant's financial reports and for failing to pay the 9th Defendant back pertaining to the said advances.

b. The 1st Plaintiff protested on the basis that the 1st Defendant had failed to fulfill his part of the Agreement. Particularly, the 1st Plaintiff told the 1st Defendant that he was to pay the 9th Defendant back for the Director's Advances.

c. The 1st Defendant said he would make sure that action was taken against the 1st Plaintiff.

d. As the 1st Plaintiff had lost control of the 9th Defendant at that material time and was only a minority shareholder, he had no choice but to accede to the 1st Defendant's threats.

15.6. On 6.05.1999, the Plaintiffs transferred their remaining 8.9% shares in the 9th Defendant to the second Defendant under duress (the '8.9% Transfer'). The shareholding of the 9th Defendant pursuant to the 8.9% Transfer was as follows:

Shareholder	No of Shares	Percentage (%)
Amona Permodalan Holdings Sdn Bhd (2nd Defendant)	1,119,999	40
Amona Consolidated Holdings Sdn Bhd (3rd Defendant)	840,000	30
Ahmad Nasarudin Othman	840,000	30
Saridah binti Ashaari (5th Defendant)	1	–
Hassan bin Jamaludin (1st Plaintiff)	0	0
Nasriah binti Ahmad (2nd Plaintiff)	0	0

16. Between 1999 and 2012, the Plaintiffs occasionally reminded the 1st Defendant of his obligations under the Agreement. The 1st Defendant ignored the reminders.

[20] In Suit 315, the plaintiffs' claim was premised on the following causes of action:

(a) illegality — it is alleged that the first allotment of 375,000 shares for RM375,000 (at the par value of RM1 per share) was in contravention of s 67(1), Companies Act 1965 ('the CA 1965'). D9 only received RM375,000 for the 375,000 shares it had allotted, which was worth RM22m;

(b) D1's failure to fulfil other terms of the agreement caused D9 to effectively allot 375,000 shares and suffer losses at the same time;

(c) all subsequent actions and/or decision by D9's shareholders, including the second allotment and the appointment of D6, D7 and D8 as directors are null and/or void;

(d) unjust enrichment of D1, D2 and D4, ie the beneficiaries of D9's shares, who have no basis to hold the shares, as no consideration for the same was paid to the plaintiffs;

(e) the shares in D9 are held on a resulting trust or alternatively, a constructive trust; and

(f) conspiracy among D1 to D5 to injure the plaintiffs through unlawful acts and/or with the predominant purpose of injuring the plaintiffs and depriving the plaintiffs of all their shares in D9.

RELIEFS SOUGHT

[21] In Suit 315, the plaintiffs sought (para 37 SOC) the following reliefs;

37.1. A declaration that the allotment of 375,000 shares to the second and fourth Defendants is a contravention of section 67(1), Companies Act 1965 and therefore null and void, and as a consequence:

(a) A declaration that the issuance of 2,175,000 shares and/or its subsequent allotment to the 1st Defendant's nominees, the second, third and sixth Defendants, is null and void; and/or

(b) A declaration that the appointments of the sixth, seventh and eighth Defendants as the directors of the 9th Defendant are null and void;

37.2. A declaration that the second and fourth Defendants are holding the 375,000 shares from the allotment on 27.08.1997 and the 250,000 shares which was transferred by the Plaintiffs to the second Defendant on 6.05.1999, as constructive trustees for the Plaintiffs;

37.3. A declaration that the 1st to fifth Defendants had conspired by unlawful means to deprive the Plaintiffs of all their shares in the 9th Defendant;

37.4. An order that the Register of members be rectified to reflect that the 9th Defendant only has 250,000 shares, and that the Plaintiffs hold 125,000 shares each;

37.5. General damages to be assessed by the Senior Assistant Registrar;

37.6. Interest at the rate of 5% from the date of the filing of the claim herein to the date of full and final settlement of an award of damages made herein;

37.7. Cost on an indemnity basis; and/or

37.8. Any further and/or other order this Honourable Court deems fit and/or otherwise appropriate.

[22] The defendants contend as follows:

(a) in Suit 111, the plaintiffs sued D1 and D2 with a claim that P1 had transferred D9's shares to D1 to be held on 'trust' in 1996 whilst P1 went to Bosnia and the defendants had, without P1's knowledge, completed all of D9's projects;

(b) on 11 April 2018, the claim against D2 was struck out and, thereafter, on 7 September 2018, the plaintiffs withdrew their claim against D1;

(c) on 23 May 2018 the plaintiffs filed Suit 304 only as against D2, claiming that D9's shares were surrendered to D2 on trust and sought their return together with a sum of RM196.6m. D2 applied to strike out the claim on the basis of res judicata but the claim was withdrawn by the plaintiffs on 3 October 2018; and

(d) the present suit (Suit 315) was the third suit filed by the plaintiffs against D1 and D2, yet again, but this time with the addition of the other defendants. The substance of the claim was essentially the same as in the previous claims ie the plaintiffs seeking the return of their shares in D9 so as to resume being its sole shareholders.

[23] Enclosures 21 and 23 were predicated on the following grounds:

(a) Suit 315 was an abuse of the process of the court;

(b) Suit 315 was not one for breach of trust but, as pleaded, it was now for a breach of an oral agreement and was, as such, time barred as the cause of action had accrued in 1999;

(c) there was no contravention of s 67 of the CA 1965 and that even assuming there were, the court could not assist the plaintiffs based on the principle of *ex turpi causa non oritur* as P1 himself had signed the transfer forms/approved the first allotment in 1997;

(d) the plaintiffs' claim in Suit 315 ought to be struck out on account of laches as they have sat on their rights and that they had also acquiesced to the issue/allotment of shares without any complaint after all these years and had only commenced Suit 315 after D1 suffered a major stroke in 2016; and

(e) additionally, D5 to D8 contended that there was no reasonable cause of action against them especially since D5 to D8 only became directors 13 years after the alleged events and that they were not parties to the alleged agreement between the plaintiffs and D1.

[24] On 4 May 2020, both applications were allowed by the learned JC with costs of RM15,000 for each application.

THE LEARNED JC'S FINDINGS

[25] On the issue of res judicata, the learned JC found that there were no special circumstances in Suit 315 to preclude the application of the principle of res judicata. The factual circumstances in all the suits were the same and, in essence, the plaintiffs were ultimately seeking a return of their shares in D9 albeit via different routes. In this regard, the learned JC found that there was merit in the defendants' contention that the filing of Suit 315 was an abuse of the court's process by the plaintiffs.

[26] The learned JC maintained that he could not see why the plaintiffs could not have raised the issues in Suit 315 in their previous suits as all the facts and circumstances were already known at the time. The plaintiffs should not be allowed to pursue their claim in instalments and on different grounds as was attempted in Suit 315. The learned JC concluded that this was a plain and obvious case for the plaintiffs' claim to be struck out on the basis of res judicata as well as being an abuse of process.

[27] On the issue of limitation, the learned JC found that the plaintiffs' claim in Suit 315 was based on a breach of an agreement by D1 in 1997 and was

A therefore clearly time barred by reason of s 6 of the Limitation Act 1953 (Revised 1981) (Act 254). According to the learned JC, the plaintiffs' attempt to assert that the shares in D9 were being held on trust coupled with the assertions of illegality were merely ingenuous ways of trying to circumvent the limitation period. Further, the plaintiffs' claims of coercion in respect of the B transfer of his shares in D9 in 1999 were claims in respect of tortious acts which were similarly caught by the prescribed limitation period.

[28] The learned JC was of the view that the plaintiffs' absence from Malaysia from 1999 to 2013 was not a valid excuse/reason for not taking any C action timeously to seek the appropriate legal remedies. The plaintiffs were also seeking what were equitable remedies in their claim. The learned JC held that the plaintiffs were guilty of laches and acquiescence.

D **[29]** According to the learned JC, the plaintiffs were fully aware of the first share allotment and the second share allotment and had acquiesced in the allotments without any complaint. In addition, the defendants' complaint that the plaintiff was guilty of laches was also meritorious.

E **[30]** The learned JC found that the plaintiffs' delay of 20 years was without any justifiable explanation and the defendants, especially D1 who has since been incapacitated, were highly prejudiced.

[31] On the issue of illegality, the learned JC held that the plaintiffs' may not F seek the assistance of the court based on the principle of *ex turpi causa non oritur* as it was not a disputed fact that it was P1 who signed the transfer form and approved the first allotment in 1997. This issue was never raised in the earlier suits and as submitted by the defendants, was clearly only raised by the plaintiffs herein in a feeble attempt to circumvent limitation.

G

OUR DECISION

[32] In our view, the issues to be dealt with were limitation, locus standi and illegality. The issue of illegality here was, however, intrinsically connected to the H issue of locus standi. For reasons which will be obvious from the grounds hereinafter set out, we do not see the need to deal with res judicata and/or abuse of process. We need only express our disagreement with the learned JC as to the applicability of the doctrine of res judicata as both the earlier suits were discontinued and were not heard on their merits.

I

[33] The plaintiffs went to great lengths to explain that D9 was a well funded and a solvent entity without any liquidity problems. But D1 painted a different picture in regards to D9's finances. According to D1, D9's projects had stalled and it owed vast amounts of monies to contractors. Although, this was a point

in dispute and would ordinarily warrant a trial of the action, in our view, even assuming the plaintiffs were right, and D9 was in a healthy financial state, it has no impact on and/or relevance to the issues at hand.

[34] The dates of the impugned events were not in dispute. It was not in dispute that the first allotment of 375,000 shares in D9 took place on 27 August 1997. That was the first date of importance in the chronology of events in this case. The second allotment of 275,000 shares took place on 24 February 1999. Finally, the plaintiffs transferred their remaining 8.9% shares in D9 on 6 May 1999. This transfer was said to be under coercion/duress, whereas the defendants contend that the plaintiffs were paid valuable consideration for their 8.9% shares.

[35] Again, it is important and imperative to keep in mind that Suit 315 was filed on 4 March 2019. Thus, any claim in contract or tort, would be time barred (per s 6 of the Limitation Act 1953).

[36] Although the plaintiffs have peppered their statement of claim with allegations of resulting trust, constructive trust and unjust enrichment, a plain reading of the statement of claim, as a whole, reveals that the gravamen of the plaintiffs' complaint was that D1 did not honour his part of an agreement. Indeed, it was even specifically pleaded that D1 'reneged' on the agreement. Nothing could be clearer.

[37] The plaintiffs were essentially mounting a claim in contract. The only document that existed and which captured the plaintiffs' complaint was a letter dated 8 August 2016. This would be approximately six months after D1 had suffered a stroke.

[38] Upon examination, the pith and substance of this letter was in regard to the plaintiffs' complaints about D1's conduct vis a vis D9, the projects and the plaintiffs' shares. The letter (*written in Bahasa Melayu and signed by the plaintiffs*) read as follows:

> Letter dd 8 August 2016
>
> Dato Hassan Bin Jamaludin
>
> Datin Nasriah Binti Ahmad
>
> 38, Jalan 1-1, Fasa 4, Taman Melawati,
>
> 53100 Kuala Lumpur
>
> 08hb Ogos 2016
>
> Dato' Othman Bin Ahmad
>
> No. 1, Jalan Kent 1,
>
> Off Jalan Maktab, 54000 Kuala Lumpur

Assalamulaikum Warahmatullahi Wabarakatuh,

Per: SAHAM SYARIKAT LANGKAH BAKTI SDN BHD & PROJEK PEMBANGUNAN KELOMPOK FASA 1 (Kampung Kerinchi Kuala Lumpur).

Pertamanya saya dan isteri bersimpati atas masalah kesihatan yang dihadapi oleh Dato' Othman dan mendoakan kesihatan Dato' Othman sekeluarga. Dalam peluang dan ruang yang masih ada, saya dan isteri terpanggil untuk membawa isu-isu berhubung pindahan saham dan urusan pengambil alihan syarikat Langkah Bakti Sdn Bhd untuk perhatian, pertimbangan dan tindakan lanjut Dato'.

Sebagaimana yang Dato' sedia maklum, syarikat Langkah Bakti adalah 100% milik saya dan isteri saya. Merujuk kepada perbincangan antara pihak saya dan Dato' kedua-dua pihak telah bersetuju kepada perkara-perkara berikut:-

1. Dato' bersetuju menguasai 60% saham syarikat Langkah Bakti dan baki 40% saham dikekalkan diatas nama saya dan isteri saya;

2. Apabila mengambil alih 60% saham Syarikat Langkah Bakti, Dato' telah memaklumkan bahawa Dato' akan menggunapakai kemudahan bank RM 30 juta (kemudahan bank yang dilulus kepada Dato' dan Dato' Hassan Harun yang belum diguna pakai) untuk menyelesaikan baki bayaran-bayaran kepada kontraktor syarikat Langkah Bakti serta menyelesaikan 'Director Advances' pada ketika itu sebanyak lebih kurang RM10 juta;

3. Dato' turut bersetuju (serta-merta apabila Dato' mengambil alih 60% saham Langkah Bakti) untuk menggunapakai sebanyak RM5.5 Juta dari kemudahan bank RM 30 juta bagi tujuan perkara-perkara berikut:

    a. bayaran penyelesaian kepada pelabur (terdahulu) melalui peguam mereka Tetuan Amin & Co diatas pelepasan dan pembatalan perjanjian jual beli antara syarikat Langkah Bakti dan syarikat mereka iaitu sebanyak RM 3 juta -yang merangkumi bayaran balik deposit 10% (RM2.2 juta) yang telah dibayar oleh mereka serta pampasan pembatalan perjajian [*sic*] jual beli saham sebanyak RM800 ribu); dan

    b. Dato', bersetuju untuk membayar kepada saya dan isteri saya sejumlah RM9 juta dalam tempoh 2 tahun selepas mengambil alih 60% saham syarikat Langkah Bakti.

    c. Juga Dato' telah bersetuju bahawa oleh kerana akaun syarikat Langkah Bakti ketika itu mempunyai baki tunai sebanyak RM500,000 (sebelum diambil alih oleh syarikat Armona Holdings Permodalan Sdn Bhd) jumlah sebanyak RM500,000 ini juga akan di bayar kepada saya dalam tempoh 2 tahun selepas mengambil alih 60% saham syarikat Langkah Bakti.

Malangnya, sehingga kini kesemua perkara-perkara diatas tidak ditunaikan oleh Dato' melainkan pembayaran dalam bentuk 'in-kind' iaitu 3 unit rumah kedai (nilai anggaran dalam RM 2.2 juta) oleh Amona Holdings Permodalan Sdn Bhd

kepada pelabur terdahulu selepas peguamcara (pelabur tardahulu) Tetuan Amin Co memulakan prosiding undang-undang dalam menuntut pembayaran penyelesaian RM 3 juta.

Sebaliknya, Dato' telah berusaha dalam pelbagai cara dan helah dalam mengambil alih baki pegangan 40% saham di dalam syarikat Langkah Bakti Sdn Bhd termasuk ugutan (untuk mengambil tindakan undang-undang) ke atas saya dan isteri saya berkenaan isu pengeluaran RM 8 juta daripada akaun syarikat Langkah Bakti Sdn Bhd (semasa saya dan isteri masih lagi mempunyai 100% pegangan saham dalam syarikat tersebut) dan memaksa saya dan isteri saya untuk (diatas dasar paksaan dan ugutan) ke atas resolusi syarikat bagi penambahan saham berbayar bertujuan merendahkan ('dilute') nilai pegangan saham saya dan isteri saya. Malah saya dan isteri saya turut dipaksa melepaskan dan menyerahkan baki pegangan 40% saham di dalam syarikat Langkah Bakti Sdn Bhd.

Saya kemudiannya mendapat tahu bahawa saham saya dan isteri saya telah dipindahkan kepada individu-individu tertentu di syarikat-syarikat kontraktor dalam menjelaskan hutang-hutang syarikat Langkah Bakti kepada kontraktor-kontrak tersebut. Saya turut dimaklumkan bahawa baki pegangan saham lain sebanyak 20% oleh Roslan Bin Khalid turut telah diambil alih oleh Dato' dengan menggantikan satu projek 2 blok rumah (apartmen dan komersil di Kampung Pandan) dimana pada asalnya projek ini adalah juga pada mulanya atas usaha dan 'contact' saya.

Saya percaya Dato' arif, sedar dan tahu berkenaan kesemua fakta-fakta yang telah saya nyatakan. Sebagai saudara sesama muslim, adalah menjadi tanggungjawab saya dalam mengingatkan Dato' berkenaan tuntutan ini dan berdoa agar Dato' diberikan nikmat kesihatan dan kesempatan dalam menyelesaikan kesemua isu-isu tuntutan duniawi ini sebelum menghadap Yang Maha Esa. Dari Abu Hurairah R.A. dari Rasulullah SAW yang bersabda:-

> 'Jiwa seorang mukmin (roh) itu akan tersekat-sekat/tergantung-gantung hanya kerana hutang-hutangnya, sehingga hutangnya itu diselesaikan'.

Sesungguhnya. Memakan rezeki secara zalim juga adalah terdiri dari antara dosa2 besar.

Dato', saya hanya ingin menuntut hak saya dan isteri saya. Saya percaya bahawa mengambil kira kedudukan Dato', *pembayaran tuntutan hak saya dan isteri* saya tidak akan menjejaskan kewangan Dato' (secara peribadi) atau kedudukan kewangan Amona Permodalan Holdings Sdn Bhd.

Rasulullah S.A.W bersabda sebagaimana yang disampaikan oleh Abu Hurairah R.A. (dimaktubkan sebagai hadis riwayat Bukhari):-

> 'Sesungguhnya yang paling baik diantara kalian adalah yang paling baik dalam membayar hutangnya'

Saya dan isteri saya berdoa agar Dato' *menyelesaikan tuntutan hak kami pada kadar segera* selagi berkesempatan agar tiada perhitungan di akhirat kelak dihadapan Yang Maha Adil. Selebihnya, saya serahkan kepada kesedaran, hemat dan pemikiran Dato'.

> Dengan menginsafi semua keadaan maka saya utuskan surat ini melalui sahabat kita saudara Mohd Tajudin Harun yang saya rasa layak menjadi perantara kita berdua.
>
> Sekian, terima kasih.
>
> Yang benar,
>
> Dato' Hassan Jamaludin
>
> Datin Nasriah Ahmad

[39] By this letter, the plaintiffs were imploring D1 to make payment of all that was allegedly due and payable to the plaintiffs. D1 did not reply the letter. At the end of the day what was clear was that the plaintiffs were seeking what they alleged was due to them. The question is — when did their cause of action accrue, or put another way, when was the earliest point in time that the plaintiffs could have sued D1?

[40] The classic definition of cause of action was explained by the Federal Court in *Nasri v Mesah* [1970] 1 LNS 85; [1971] 1 MLJ 32 (FC) where Gill FJ said (p 34 MLJ):

> A 'cause of action' is the entire set of facts that gives rise to an enforceable claim; the phrase comprises every fact which, if traversed, the plaintiff must prove in order to obtain judgment (per Lord Esher MR in *Read v Brown* [1889] 22 QBD 128, 131). In *Reeves v Butcher* [1891] 2 QB 509, 511 Lindley LJ said:
>
> This expression, 'cause of action', has been repeatedly the subject of decision, and it has been held, particularly in *Hemp v Garland* LR 4 QB 519, decided in 1843, that the cause of action arises at the time when the debt could first have been recovered by action. The right to bring an action may arise on various events; but it has always been held that the statute runs from the earliest time at which an action could be brought.
>
> In *Board of Trade v Cayzer, Irvine & Co* [1927] AC 610, 617. Viscount Dunedin described 'cause of action' as that which makes action possible. Now, what makes possible an action founded on a contract is its breach. In other words, a cause of action founded on a contract accrues on the date of its breach. Similarly, the right to sue on a contract accrues on its breach. In the case of actions founded on contract, therefore, time runs from breach (per Field J in *Gibbs v Guild* [1881] 8 QBD 296, 302). In the case of actions founded on any other right, time runs from the date on which that right is infringed or there is a threat of its infringement (see *Bolo*'s case LR 57 IA 325).
>
> It would seem clear, therefore, that the expressions 'the right to sue accrues', 'the cause of action accrues' and 'the right of action accrues' mean one and the same thing when one speaks of the time from which the period of limitation as prescribed by law should run.

[41] Turning now to the facts of the present case, we are of the view that the plaintiffs' pleaded case, coupled with the plaintiffs' letter dated 8 August 2016, was really one for recovery of monetary entitlements arising out of an alleged

'agreement' which was formed sometime in late 1996 and which became the catalyst for the first share allotment of 375,000 shares on 27 August 1997 and the second allotment of 2,175,000 shares on 24 February 1999. The third impugned event took place on 6 May 1999, when the plaintiffs remaining 8.9% shares in D9 were transferred to D2.

[42] There were three possible dates when the causes of action could be said to have arisen. Given that the plaintiffs were seeking to recover their original shares in D9 by attempting to annul the two allotment of shares and cancelling the transfer of their 8.9% shares, we think that we should take the latest date, 6 May 1999, as the date by which the plaintiffs cause(s) of action for the entire claim would have crystallised. On that basis, the last date for the filing of any action, whether in tort or contract would be 5 May 2005. Here, however, Suit 315 was filed on 4 March 2019 which was roughly 20 years from the latest date that any cause of action in contract or tort would have arisen. Even if the claim based on a conspiracy were to be entertained, the cause of action for such a claim would have accrued on 6 May 1999 (or earlier). Thus, on that basis, the plaintiffs' claims whether grounded in contract or tort, was time barred.

[43] There was then the issue of illegality. The plaintiffs contended that the first allotment was illegal as it deprived D9 of the full market value of the allotted shares — RM22.0m. The plaintiffs accept that RM375,000 was paid for the shares that were allotted. What the plaintiffs contended was that the deal which they had with D1 was such that RM22m (less RM375,000) would be paid to them.

[44] On that basis, the plaintiffs contend that the agreement was in contravention of s 67 of the Companies Act 1965 and that the first share allotment and second share allotment were illegal and therefore, null and void. It was not in dispute that P1 was one of the directors of D9 when the authorised capital of D9 was increased and the first allotment of shares (to D2 and D4) was made, ie on 27 August 1997.

[45] This prompted the defendants to contend that the plaintiffs cannot rely on their own illegality to mount a claim. The learned JC accepted the defendants' contention. Since the issue of illegality was predicated on s 67 of the Companies Act 1965, it is necessary to set out that section in full to appreciate its scope and purpose. Section 67 of the Companies Act 1965 reads as follows:

> 67 Dealing by a company in its own shares, etc.
>
> (1) Except as is otherwise expressly provided by this Act no company shall give, whether directly or indirectly and whether by means of a loan, guarantee or the provision of security or otherwise, any financial assistance for the purpose of or in connection with a purchase or subscription made or to be made by any person of or

for any shares in the company or, where the company is a subsidiary, in its holding company or in any way purchase, deal in or lend money on its own shares.

(2) Nothing in subsection (1) shall prohibit —

(a) where the lending of money is part of the ordinary business of a company, the lending of money by the company in the ordinary course of its business;

(b) the provision by a company, in accordance with any scheme for the time being in force, of money for the purchase of or subscription for fully-paid shares in the company or its holding company, being a purchase or subscription by trustees of or for shares to be held by or for the benefit of employees of the company or a subsidiary of the company, including any director holding a salaried employment or office in the company or a subsidiary of the company; or

(c) the giving of financial assistance by a company to persons, other than directors, bona fide in the employment of the company or of a subsidiary of the company with a view to enabling those persons to purchase fully-paid shares in the company or its holding company to be held by themselves by way of beneficial ownership.

(3) If there is any contravention of this section, the company is, notwithstanding section 369, not guilty of an offence but each officer who is in default shall be guilty of an offence against this Act.

Penalty: Imprisonment for five years or one hundred thousand ringgit or both.

(4) Where a person is convicted of an offence under subsection (3) and the Court by which he is convicted is satisfied that the company or another person has suffered loss or damage as a result of the contravention that constituted the offence, the Court may, in addition to imposing a penalty under that subsection, order the convicted person to pay compensation to the company or the person, as the case may be, of such amount as the Court specifies, and any such order may be enforced as if it were a judgment of the Court.

(5) The power of a Court under section 354 to relieve a person to whom that section applies, wholly or partly and on such terms as the Court thinks fit, from a liability referred to in that section, extends to relieving a person against whom an order may be made under subsection (4) from the liability to have such an order made against him.

(6) Nothing in this section shall operate to prevent the company or any person from recovering the amount of any loan made in contravention of this section or any amount for which it becomes liable, either on account of any financial assistance given, or under any guarantee entered into or in respect of any security provided, in contravention of this section.

[46] The defendants contended that a transaction which is in breach of s 67 of the Companies Act 1965 remains unaffected by such breach. Pertinently, the company was not tainted by such breach and was at liberty to pursue a claim for recovery of any depletion of its assets by reason of a breach of 67 of the

Companies Act 1965.

[47] In this regard, it is relevant to quote from the decision of the Federal Court in *Lori (M) Bhd (interim receiver) v Arab-Malaysian Finance Bhd* [1999] 3 MLJ 81 (FC) where Edgar Joseph Jr FCJ, explained (p 106) that s 67 was to protect the company, its shareholders, creditors and the public. He said:

> Looking at the second limb of sub-s (6) of s 67 ourselves, we consider that the section was enacted for the protection of the company's funds and the interests of shareholders *as well as creditors* and, we would add, the public generally.

[48] Then at p 108, Edgar Jospeh Jr FCJ said:

> In our view, sub-s (6) of s 67 creates an important exception to s 24 of the Contracts Act by allowing recovery under an illegal contract, thereby excluding the operation of s 24. A good illustration of the application of such a provision is found in the well-known Privy Council case of *Batu Pahat Bank Ltd v Official Assignee of the property of Tan Keng Tin* [1933] AC 691 per Lord Russell at pp 238-239. In our view, the words of Lord Russell would apply equally to s 67 of the Act. See, also, *Datuk Tan Lay Teck v Sarjana Sdn Bhd & Ors* [1997] 3 AMR 2718 at p 2757 per Augustine Paul JC, as he then was, which is precisely in point.
>
> With the most profound respect, we consider that *Chung Khiaw Bank* was decided *per incuriam* because of its failure to actually construe the all important five words 'for which it becomes liable' appearing in sub-s (6) of s 67. In our view therefore, in a situation where a company obtains a loan from a financial institution on the security of a charge over its land for the purpose of enabling an intending purchaser to purchase shares of the company, the company's liability to the financial institution both in respect of the loan and the security *remains unaffected*, having regard to the saving provision in the second limb of sub-s (6) of s 67 of the Act.

[49] Thus, on the basis of the principle that was enunciated by the Federal Court in *Lori (M) Bhd*, it is clear that the first share allotment and second share allotment, even *if* they were illegal in the sense that they contravened s 67 of the Companies Act 1965, the underlying transactions remain unaffected.

[50] We are, however, not convinced that the share allotments at par value instead of an allotment at market value or at a premium was, in itself, illegal. We do not see how the assets of D9 could have been depleted by a share allotment at par value.

[51] At any rate, giving the plaintiffs the benefit of doubt and even assuming (without concluding) that the first allotment and second allotment were in contravention of s 67 of the Companies act 1965, we are of the view that the allotments are not *ipso facto* rendered null and void.

[52] At best, even if D9 had suffered any damage by reason of the allotments, it remains at liberty to pursue a claim against the relevant parties. The point being, it is D9 and not the plaintiffs' which will have the requisite locus standi to pursue such a claim.

[53] Indeed, this part of our judgment demolishes the plaintiffs' argument that they have a claim for unjust enrichment, resulting trust or constructive trust. It is clear that they have no right to make any claim in respect of the first share allotment (which took place on 27 August 1997) or the second share allotment (which took place on 24 February 1999). The claim, in respect of the share allotments, if any, was to be made by D9, the company.

[54] The plaintiffs, not being shareholders or creditors of D9, do not have any legal basis to mount a claim in respect of the share allotments. Before we conclude on this point, it is necessary to state that the plaintiffs' claim in Suit 315 was quite different from the claims that were presented in Suit 111 and Suit 304. Further, the plaintiffs were fully aware of the share allotments which took place on 27 August 1997 and 24 February 1999.

[55] It may be noted that the plaintiffs have not alleged that there was any fraud in relation to the share allotments. It is also to be observed that despite knowing of the share allotments, the plaintiffs proceeded with their venture overseas and were apparently out of Malaysia from 1999 until 2013. We do not think that the fact of the plaintiffs' absence from Malaysia was of any utility to the plaintiffs' in making their claims.

[56] On the flip side, the plaintiffs inertia and inaction (*which have not been explained*) in all those years until the suits were filed, was an implied, if not express, manifestation of acquiescence on their part, and the plaintiffs' are therefore barred from seeking any declaratory reliefs by reason thereof and in addition, by reason of laches (s 32 of the Limitation Act 1953).

[57] The last point that needs be dealt with was the claim in relation to the plaintiffs' 8.9% shareholding in D9 which they claim were transferred to D2 under duress/coercion. It may well be that there is no limitation period for declaratory relief. But here the plaintiffs have sought both declaratory and substantive reliefs so as to reinstate their position as shareholders of D9 with each holding 125,000 of D9's shares (see: prayer 37.4 SOC). We do not think that the plaintiffs are entitled to make such a claim after such a long period of inaction on their part. Clearly, by their conduct, the plaintiffs have acquiesced in the state of affairs in D9 vis a vis the shareholdings of the respective defendants.

[58] Although the court will generally be reluctant to entertain issues such as laches and acquiescence based on affidavit evidence, we are satisfied that the present case was a plain and obvious one where the defendants are entitled to rely on acquiescence and/or laches to defeat the plaintiffs' claims as pleaded in the SOC.

CONCLUSION

[59] For the reasons stated, we find that there was no merit in the appeals. Both the appeals are therefore dismissed with costs of RM15,000 for each appeal, to be paid by the appellants to the respondents, subject to the allocatur to be imposed.

Appeals dismissed.

Reported by Nabilah Syahida Abdullah Salleh